OPINION OF ADVOCATE GENERAL KOKOTT

delivered on 8 December 2005 [1]

I — Introduction

1. The present case arises from a Commission competition procedure concerning the wholesale market in electrotechnical fittings in the Netherlands. In that procedure, which covered a period of over eight years from the initial inquiries to the Commission decision, the Commission imposed fines on the Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied ('the FEG') and one of its members, Technische Unie BV ('TU'), for infringements of Article 81(1) EC.

2. The relevant Commission decision of 26 October 1999 [2] ('the contested decision') was upheld in its entirety by the Court of First Instance by judgment of 16 December 2003 in Joined Cases T-5/00 and T-6/00 [3] ('the judgment under appeal').

3. An appeal against that judgment at first instance has now been brought before the Court of Justice by TU. [4] In addition to raising a number of pleas in law essentially alleging failure to state reasons and infringement of Article 81 EC, TU accuses the Court of First Instance, in particular, of having failed to draw the necessary conclusions from the excessive length of the procedure before the Commission

II — Relevant legislation

4. Article 81(1) EC prohibits 'all agreements between undertakings, decisions by associa-

1 — Original language: German.

2 — Commission Decision 2000/117/EC of 26 October 1999 concerning a proceeding pursuant to Article 81 of the EC Treaty, Case IV/33.884 — Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied and Technische Unie (FEG and TU), notified under document number C(1999) 3439 (OJ 2000 L 39, p. 1).

3 — *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied and Technische Unie* v *Commission* [2003] ECR II-5761.

4 — An appeal brought by the FEG against the same judgment is also pending before the Court of Justice (Case C-105/04 P); see, in this regard, my Opinion of today's date.

tions of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market ...'.

...

In fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement.'

5. In such cases, the Commission may impose fines on the undertakings concerned, as provided for in Article 15(2) of Council Regulation No 17 of 6 February 1962 [5] ('Regulation No 17'):

III — Facts and procedure

A — *Facts and procedure before the Commission*

'The Commission may by decision impose on undertakings or associations of undertakings fines of from 1 000 to 1 000 000 units of account, or a sum in excess thereof but not exceeding 10% of the turnover in the preceding business year of each of the undertakings participating in the infringement where, either intentionally or negligently:

(a) they infringe [Article 81(1) EC] ...;

6. The competition case underlying this dispute concerns the Netherlands wholesale market for electrotechnical fittings, that is to say, for example, wires and cables as well as polyvinyl chloride (PVC) tubes. The Commission found there to be on that market a 'collective exclusive dealing arrangement' which the FEG association of undertakings had entered into, inter alia, with the NAVEG [6] association of undertakings by means of a 'gentlemen's agreement' and which was intended to prevent supplies to non-members of the FEG. It also found that the FEG had restricted the freedom of its members to determine their selling prices independently.

5 — Regulation No 17: First Regulation implementing Articles [81] and [82] of the Treaty (OJ, English Special Edition 1959-1962 (1), p. 87). That regulation has in the meantime been replaced by Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003 L 1, p. 1). However, as the latter regulation applies only from 1 May 2004, Regulation No 17 alone is relevant to this case.

6 — Nederlandse Vereniging van Alleenvertegenwoordigers op Elektrotechnisch Gebied.

7. In paragraphs 3 to 5 of the judgment under appeal, the Court of First Instance summarises the background to this case as follows:

'3 CEF Holdings Ltd (hereinafter "CEF UK"), a United Kingdom wholesale distributor of electrotechnical fittings, decided to establish itself in the Netherlands market, where for that purpose it established a subsidiary, CEF City Electrical Factors BV ("CEF BV"), in May 1989. Perceiving problems of supply in the Netherlands, CEF BV and CEF UK ... lodged a complaint with the Commission on 18 March 1991, which the Commission registered on the following day.

4 The complaint concerned three associations of undertakings in the electrotechnical fittings sector, and the members thereof. In addition to the FEG, these were ... NAVEG ... and Unie van de Elektrotechnische Ondernemers (Union of Electrotechnical Undertakings, hereinafter "UNETO").

5 CEF considered that those associations and their members had concluded reciprocal collective exclusive dealing agreements at all levels of the distribution chain for electrotechnical fittings in the Netherlands. Unless it joined the FEG, it would therefore be virtually impossible for a wholesale distributor of electrotechnical fittings to enter the Netherlands market. The manufacturers and their agents or importers supply only members of the FEG; fitting contractors purchase only from FEG members. By letter of 22 October 1991, CEF widened the scope of its complaint, so as to cover agreements between the FEG and its members concerning prices and price reductions, and agreements designed to prevent CEF from participating in certain projects. As from January 1992, CEF also complained of vertical price-fixing arrangements between some manufacturers of electrotechnical fittings and FEG wholesalers.'

8. Furthermore, paragraphs 6 to 14 of the judgment under appeal, which relate to the course of the investigations and the proceedings before the Commission, read as follows:

'6 [Between June and August 1991, the Commission sent to, inter alia, TU a number of requests for information on the basis of Article 11 of Regulation No 17.]

7 By letter of 16 September 1991, the Commission sent the FEG a letter of formal notice concerning, among other things, pressure brought to bear on certain suppliers of electrotechnical fittings not to supply CEF, concerted

practices engaged in by FEG members regarding prices and discounts and the turnover criterion applied for admission to FEG membership.

8 On 27 April 1993, the Commission questioned a number of suppliers of electrotechnical fittings, under Article 11 of Regulation No 17.

9 On 10 June 1994, the Commission requested information from the FEG, under Article 11 of Regulation No 17.

10 On 8 and 9 December 1994, the Commission carried out inspections under Article 14(3) of Regulation No 17 at the premises of the FEG and some of its members, including TU.

11 On 3 July 1996, the Commission notified its objections to the FEG and to seven of its members [including TU] (hereinafter "the statement of objections"). The FEG and TU lodged observations in response to that statement, on 13 December 1996 and 13 January 1997 respectively.

12 The FEG and TU submitted several requests to the Commission for access to the file. After disclosure to them on 16 September 1997 of a number of supplementary documents contained in the file, on 10 October 1997 each of them sent to the Commission further submissions in response to the statement of objections.

13 A hearing was held on 19 November 1997, attended by all the addressees of the statement of objections and by CEF.

14 Subsequently, on 26 October 1999, the Commission adopted the contested decision ...'.

B — *The contested decision*

9. In the contested decision, the Commission essentially found that the FEG had committed two infringements of Article 81(1) EC and fined it for doing so. At the same time, it found that TU had taken an active part in the infringements committed

by the FEG. The operative part of the contested decision, in extract, reads as follows:

'*Article 1*

The FEG has infringed Article 81(1) [EC] by entering into a collective exclusive dealing arrangement intended to prevent supplies to non-members of the FEG, on the basis of an agreement with NAVEG, and of practices concerted with suppliers not represented in NAVEG.

Article 2

The FEG has infringed Article 81(1) [EC] by directly and indirectly restricting the freedom of its members to determine their selling prices independently. It did so by means of the Binding Decision on fixed prices, the Binding Decision on publications, the distribution to its members of price guidelines for gross and net prices, and by providing a forum for its members to discuss prices and discounts.

Article 3

TU has infringed Article 81(1) of the Treaty by taking an active part in the infringements referred to in Articles 1 and 2.

Article 4

...

2. TU shall immediately bring the infringements referred to in Article 3 to an end, if it has not already done so.

Article 5

1. For the infringements referred to in Articles 1 and 2, a fine of EUR 4.4 million is imposed on the FEG.

2. For the infringements referred to in Article 3, a fine of EUR 2.15 million is imposed on TU.

...'

10. On account of the irregularities in the administrative procedure, which it itself acknowledges, not least the considerable length of that procedure, the Commission applied a reduction of EUR 100 000 in calculating the fine. [7]

C — *Judicial procedure*

11. Both the FEG [8] and TU [9] brought an action against the contested decision before the Court of First Instance, each claiming that the Court should:

— annul the contested decision; [10]

— in the alternative, annul the respective fines;

— in the further alternative, reduce the amount of the respective fines; and

— order the Commission and the interveners to pay the costs.

12. An application by the FEG for interim measures was dismissed. [11]

13. The President of the First Chamber of the Court of First Instance granted CEF BV and CEF UK (together 'CEF') leave to intervene in support of the forms of order sought by the Commission. [12]

14. After joining Cases T-5/00 and T-6/00 for the purposes of the oral procedure and judgment, on 16 December 2003 the Court of First Instance gave the judgment under appeal, in which it:

— dismissed the applications; and

7 — See recitals 151 to 153 in the preamble to the contested decision.

8 — Case T-5/00.

9 — Case T-6/00.

10 — In Case T-6/00, TU also claimed in the alternative that the Court of First Instance should annul the finding, in Article 3 of the contested decision, that it had infringed Article 81 EC.

11 — Orders of the President of the Court of First Instance of 14 December 2000 in Case T-5/00 R *FEG* v *Commission* [2000] ECR II-4121 and of the President of the Court of Justice of 23 March 2001 in Case C-7/01 P(R) *FEG* v *Commission* [2001] ECR I-2559.

12 — Order of 16 October 2000 in Cases T-5/00 and T-6/00.

— ordered the applicants to pay the costs of the respective proceedings.

15. By its appeal, received at the Court Registry on 3 March 2004, TU now claims that the Court should:

— set aside the judgment under appeal in Joined Cases T-5/00 and T-6/00, or at least in so far as it relates to Case T-6/00 and, having regard to the application in the second indent, give final judgment itself, or, in the alternative, set aside the judgment and refer the matter back to the Court of First Instance;

— declare all or part of the contested decision to be null and void, or at least, ruling anew, reduce substantially the amount of the fine imposed on it; and

— order the Commission to pay all the costs.

16. The Commission contends that the Court should:

— dismiss the appeal in its entirety as inadmissible or at least unfounded; and

— order the appellant to bear the costs.

17. The intervening party CEF contends that the Court should:

— dismiss the appeal in its entirety as inadmissible or in any event as unfounded; and

— order the appellant to bear the costs.

18. The appeal was made to the Court first in writing and then orally, on 22 September 2005, together with Case C-105/04 P.

IV — The second to fourth pleas in law and the first and third parts of the fifth plea in law

19. By its second to fourth pleas in law and by the first and third parts of its fifth plea in law, TU challenges a number of passages

from the judgment under appeal in which the Court of First Instance considers the individual findings of the Commission in relation to the infringements and the duration of those infringements.

20. Before assessing each of those pleas in law, it seems appropriate to recall the criterion governing the review of judgments of the Court of First Instance which is laid down in Article 225(1) EC and the first paragraph of Article 58 of the Statute of the Court of Justice and which the Court of Justice has consistently applied in appeal proceedings: [13] an appeal is to be limited to points of law. For that reason, the Court of First Instance alone has jurisdiction to establish and assess the relevant facts and evidence; the assessment of the facts and evidence, unless they have been distorted, does not constitute a point of law which is subject, as such, to review by the Court of Justice on appeal.

21. Furthermore, an appeal which merely reproduces the pleas in law and arguments previously submitted to the Court of First Instance, without even including submissions specifically identifying the error of law allegedly vitiating the judgment under appeal, does not satisfy the requirements laid down by law. In reality, such an appeal amounts to no more than a request for re-examination of the application, which falls outside the jurisdiction of the Court of Justice. [14]

22. The second to fourth pleas in law and the first and third parts of the fifth plea in law must now be examined with the foregoing in mind.

A — *The second plea in law: failure to take account of exculpatory evidence from the period before notification of the statement of objections*

23. By its second plea in law, TU claims that the Court of First Instance infringed the principle of the presumption of innocence and the requirement to state reasons by failing to recognise as exculpatory evidence certain documents drawn up after the start of the Commission's investigations and its letter of formal notice but before the statement of objections.

24. That plea in law, which is closely linked to the first plea in law, relates specifically to paragraphs 196 and 208 of the judgment under appeal. In those paragraphs, the Court of First Instance considers the probative value of a number of letters, submitted to the

13 — See, inter alia, Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others* v *Commission* ('*Cement* judgment') [2004] ECR I-123, paragraphs 47 to 49, and Case C-37/03 P *BioID* v *OHIM* [2005] ECR I-7975, paragraphs 43 and 53.

14 — Case C-352/98 P *Bergaderm and Goupil* v *Commission* [2000] ECR I-5291, paragraph 35; Case C-234/02 P *Ombudsman* v *Lamberts* [2004] ECR I-2803, paragraph 77; and Case C-286/04 P *Eurocermex* v *OHIM* [2005] ECR I-5797, paragraph 50.

Commission by third parties, which, in the view of TU, rebut the allegations made in connection with the collective exclusive dealing arrangement. In this regard, the Court of First Instance concludes that the documents concerned are not capable of refuting the Commission's finding that the 'gentlemen's agreement' between the FEG and NAVEG was actually implemented in practice. [15]

25. TU counters that conclusion by arguing that the judgment under appeal is *inherently contradictory*. On the one hand, the Court of First Instance does not recognise as exculpatory the documents dating from the period after the Commission's letter of formal notice but before the notification of the statement of objections. Therefore, as regards the appraisal of the evidence, TU was treated as a defendant from the time of the letter of formal notice. On the other hand, the Court of First Instance does not regard TU as a defendant when it comes to determining the starting point for application of the principle of a reasonable time-limit. In this respect, the Court of First Instance considers that only the notification of the statement of objections is relevant. Consequently, the conclusions which the Court of First Instance attaches to the time of the letter of formal notice are not conclusive per se. In its view, the Court of First Instance applies a double standard.

26. The question whether the grounds of a judgment of the Court of First Instance are contradictory is a point of law which is amenable, as such, to judicial review on appeal. [16] To that extent, TU's appeal is therefore admissible.

27. However, contrary to what TU appears to assume, the assessment of the probative value of documents and the evaluation of the reasonableness of the length of proceedings bear no relation to each other. Accordingly, the two paragraphs of the judgment under appeal, in which the Court of First Instance considers, on the one hand, the length of the proceedings and, on the other hand, the probative value of the documents at issue, likewise exhibit no logical connection with each other and, moreover, cannot therefore be substantively contradictory as TU claims.

28. In particular, the mere fact that a particular document was drawn up *before* the statement of objections does not necessarily mean that that document constitutes exculpatory evidence. By the same token, a document which was drawn up *after* the statement of objections does not necessarily constitute incriminating evidence. Rather, the probative value of a document must always be considered by reference to all the facts of the case in question. Thus, the value of evidence alleged to be exculpatory evidence may diminish, for example, because it came to light at the initiative of the defendants and at a time when it was already clear that the Commission had begun to

15 — See also paragraph 209 of the judgment under appeal.

16 — Case C-401/96 P *Somaco* v *Commission* [1998] ECR I-2587, paragraph 53, and Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417, paragraph 25. See also, to the same effect, Case C-208/03 P *Le Pen* v *Parliament* [2005] ECR I-6051, paragraph 45.

suspect a cartel infringement and the undertakings concerned had therefore received a warning (*'in tempore suspecto'*). It was just such an assessment of the case in question which the Court of First Instance carried out, without making any error of law, in the judgment under appeal.

29. In conclusion, the second plea in law is therefore admissible but unfounded.

B — *The third plea in law: submission of evidence regarding TU's responsibility for the infringements found*

30. By its third plea in law, TU claims that the Court of First Instance erred in law or at least stated incomprehensible reasons for its judgment when it held that the Commission was right to hold TU responsible for the infringements found in Articles 1 and 2 of its contested decision.

31. This plea in law concerns, in particular, that part of the judgment under appeal entitled 'The claims for annulment' and Section III. There the Court of First Instance considers in detail whether the infringements of Article 81(1) EC found in Articles 1 and 2 of the contested decision may be attributed to TU. The Court of First Instance concludes that the Commission was right to conclude that TU took an active part in the collective exclusive dealing arrangement in the form of a 'gentlemen's agreement' between the FEG and NAVEG and in the concerted practice of extending that arrangement to suppliers not belonging to NAVEG and in the price-fixing scheme.[17]

32. TU essentially raises three points to the contrary, which also form the three parts of this plea in law.

1. TU's participation in the collective exclusive dealing arrangement (first part of the third plea in law)

33. In the first part of the third plea in law, TU contends essentially that the Court of First Instance failed to take account of several factors when considering whether the Commission had been right to conclude that TU had taken an active part in the collective exclusive dealing arrangement.

34. According to TU, first, the Court of First Instance overlooked the fact that the representative on the FEG board attributed to TU is not in fact bound by instructions and is

17 — See, inter alia, paragraphs 360, 367 and 379 of the judgment under appeal.

obliged to pursue only the interests of that association and not those of TU. The Court of First Instance failed to understand FEG's articles of association and Netherlands law on associations. Second, the Court of First Instance was wrong to assume from the outset that the interests of the FEG and one of its largest members, TU, largely coincided. [18] Third, the fact that TU was a member of the FEG board for many years and thus attended most — even if not all — the relevant meetings is not sufficient to conclude that TU took a personal and active part in the collective exclusive dealing arrangement. There is a clear difference between frequent participation in FEG management body deliberations and direct participation in drawing up FEG policy. In addition, TU claims that the Court of First Instance failed to state sufficient reasons and made a manifest error in so far as it held in paragraph 351 of the judgment under appeal that TU played 'a key role within the FEG as regards the collective exclusive dealing arrangement'. The Commission does not use the term 'key role' in the contested decision.

35. The Commission, supported by CEF, replies that TU's arguments are inadmissible because they merely question the Court of First Instance's assessment of the facts.

36. TU's arguments in fact concern essentially only the Court of First Instance's assessment of the particular circumstances of the case. The issue whether TU was one of the FEG's largest members and played a key role within that trade association, whether — notwithstanding existing provisions in the articles of association and the law on associations — it had influence over FEG management, and whether it should be concluded that its interests and those of the FEG run largely in parallel are all issues relating to the appraisal of the facts and evidence which are not subject to review by the Court of Justice on appeal. [19] Therefore, in this respect, TU's argument is inadmissible. [20]

37. However, on closer examination, TU's argument is not merely a criticism of the assessment of the facts carried out by the Court of First Instance or a repetition of the complaints raised at first instance. [21] TU also argues that, in its judgment, the Court of First Instance failed to meet the standard laid down by law for proving an infringement of Article 81(1) EC and that, in this respect, the judgment did not duly state the reasons on which it was based. The standard of proof

18 — In both recital 69 in the preamble to the contested decision and in paragraph 353 of the judgment under appeal, the words 'interests which run more or less in parallel' are used.

19 — See point 20 of this Opinion.

20 — Moreover, even if TU's argument regarding the use of the term 'key role' were to be regarded as a complaint relating to *distortion* of the facts and thus deemed to be admissible, it would be in any event unfounded. The term 'key role' referred to by the Court of First Instance is substantively equivalent to the concept 'a role ... so important that it should be examined individually' referred to by the Commission (see recital 69 in the preamble to the contested decision).

21 — See paragraph 351 of the judgment under appeal in which the Court of First Instance takes similar complaints made by TU at first instance as the starting point for its considerations regarding TU's participation in the collective exclusive dealing arrangement.

which the Commission must satisfy in a cartel decision, in particular the *kind of evidence* on which it can base its finding of an infringement of the competition rules laid down in the Treaty, is a point of law which may be referred to the Court of Justice on appeal.

38. Interpreted in this way, the third plea in law is therefore admissible. From the point of view of the substance of the case, however, it cannot be upheld.

39. The Court of First Instance correctly takes as a starting premiss the principle that the members of a trade association cannot automatically be held responsible for any unlawful practice on the part of that association. [22] Instead, it is for the Commission to prove that the undertakings in a trade organisation have actively participated in unlawful conduct on its part and thus themselves infringed Article 81(1) EC.

40. However, proof of such participation cannot even be furnished on the basis of indicia. The Court of Justice expressly acknowledges that anti-competitive practices and agreements are by their nature not infrequently intended to be secret and the associated documentation is restricted to a minimum. Documents such as the minutes of a meeting will usually only be sparse and, furthermore, inevitably fragmentary, so that it is often necessary to reconstitute certain details by deduction. Thus, in most cases, the existence of anti-competitive practices or agreements must be inferred from a number of indicia and coincidences which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules. [23]

41. In particular, it is settled case-law that it is sufficient for the Commission to show that an undertaking participated in meetings at which anti-competitive agreements were concluded, without manifestly opposing them, to prove to the requisite standard that the undertaking participated in the cartel. Where participation in such meetings has been established, it is for that undertaking to put forward evidence to establish that its participation in those meetings was without any anti-competitive intention by demonstrating that it had indicated to its competitors that it was participating in those meetings in a spirit that was different from theirs. [24]

22 — Paragraph 355 of the judgment under appeal.

23 — *Cement* judgment (cited in footnote 13), paragraphs 55 to 57.

24 — Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others* v *Commission* [2005] ECR I-5425, paragraph 142 and also paragraphs 143 and 144; *Cement* judgment (cited in footnote 13), in particular paragraph 81 and also paragraphs 82 to 85; Case C-49/92 P *Commission* v *Anic Partecipazioni* [1999] ECR I-4125, paragraphs 87 and 96; and Case C-199/92 P *Hüls* v *Commission* [1999] ECR I-4287, paragraph 155.

42. Where necessary, an undertaking can also be represented by 'its board member' at meetings held in connection with the board of an association, such as a trade association. This may be assumed, for example, where a member of the board of a trade association has a particularly close link with the undertaking concerned because, for instance, he works principally for that undertaking, owes his seat on the board to that undertaking, and looks after the interests of that undertaking — in fact if not in law — on the board. His official capacity as representative of an undertaking, the existence of a power to issue instructions, or even evidence of specific instructions from an undertaking to the board member cannot realistically be decisive.

43. Consequently, the Court of First Instance did not err in law when it approved the indicia-based evidence submitted by the Commission concerning TU's active participation in the infringements of competition rules by the FEG. Furthermore, contrary to the contention of TU, it was by no means wrong to regard the attendance of TU staff at FEG board meetings and the influence on the formation of FEG policy thus exerted as active and not merely passive participation in FEG's infringements of competition rules. The rest relates to an appraisal of the facts and evidence in a particular case which the Court of Justice is not permitted to review.

44. Therefore, the first part of the third plea in law is inadmissible in part and unfounded in part.

2. Participation in the extension of the collective exclusive dealing arrangement to companies outside NAVEG (second part of the third plea in law)

45. The line of argument put forward in the second part of the third plea in law is, in its reasoning, largely the same as the first part thereof. TU considers that the Court of First Instance made an error of law, or at least in its reasoning, as regards the extension of the collective exclusive dealing arrangement to companies not belonging to NAVEG in that it regarded TU's active participation as proven. In particular, TU criticises the fact that the Court of First Instance regarded the following circumstances as relevant indications of its actual participation: the fact that TU is one of the largest members of the FEG and the fact that it was, for many years, represented continually on the FEG board and involved in the drafting of its policy without publicly distancing itself from it. In any event, the mere fact that TU representatives were members of the FEG board could not prove any TU participation in the infringements beyond 1991.

46. Like the first part of the third plea in law, this second part also seeks essentially to question the appraisal of the facts and evidence by the Court of First Instance. TU's line of argument on this point is accordingly inadmissible. [25]

47. Furthermore, in so far as TU claims that the Court of First Instance misunderstood, in its judgment, the legal requirements relating to proof of its involvement in the infringements, its argument is admissible but substantively unfounded. As stated above, the use of indicia is a question of law. [26] In the present case, such indicia include, inter alia, TU's participation in meetings through the individuals on the FEG board who were close to it, and, in this connection, also its participation in the drawing-up of FEG policy, which certainly continued beyond 1991. [27]

48. Consequently, the second part of the third plea in law is likewise inadmissible in part and unfounded in part.

25 — See points 20 and 36 of this Opinion.

26 — See points 40 to 43 of this Opinion.

27 — See, by way of example, paragraph 365 of the judgment under appeal.

3. TU's participation in the price-fixing scheme (third part of the third plea in law)

49. By the third part of its third plea in law, TU criticises the Court of First Instance for incorrectly approving the evidence submitted by the Commission concerning TU's active participation in the price-fixing scheme.

50. In particular, TU complains that it is being held liable for the FEG's binding decisions on fixed prices and publications solely by virtue of its membership of that trade association. According to TU, concrete evidence should have been furnished of its active participation in such decisions and otherwise in any other anti-competitive conduct in connection with price fixing.

51. This argument is based on a misunderstanding of the judgment under appeal. The Court of First Instance did not in any way begin with the premiss that TU is automatically liable, as a member, for the unlawful conduct of the trade association FEG. On the contrary, the Court of First Instance expressly made findings as to TU's active participation. It not only pointed to

TU's participation through the FEG board members attributable to it,[28] it also highlighted the price information which TU passed to the FEG as active involvement in the infringement.[29]

52. Consequently, the third and final part of the third plea in law is likewise unfounded.

C — *The fourth plea in law: assessment of the duration of the infringements of the competition rules*

53. By the fourth plea in law, TU claims that the Court of First Instance made an error in law, or at least in its reasoning, as regards its comments on the duration of the infringements found and the continuous nature thereof.

54. This plea in law relates principally to paragraphs 406 to 413 of the judgment under appeal, in which the Court of First Instance considers the duration of the disputed infringements. In those paragraphs, the Court of First Instance upholds the Commission's findings and concludes that there have been single infringements of a continuous nature.[30]

55. TU contests this in the three parts in total of its fourth plea in law.[31] Since TU puts forward similar arguments in various parts of its appeal, including in connection with the second part of its third plea in law[32] and in connection with the first part of its fifth plea in law, its arguments will be considered together below.

56. TU argues essentially that the view on the duration and continuous nature of the infringements which the Court of First Instance took as a basis in the judgment under appeal is incorrect and disregards the heterogeneous nature of inter alia the individual components of the price-fixing scheme. TU adds that its participation in the price-fixing scheme was particularly negligible.

57. It is evident that TU is thus seeking principally to subject the appraisal of the facts by the Court of First Instance to a fresh review by the Court of Justice. In this respect, its arguments are therefore inadmissible.[33]

28 — Paragraph 377 of the judgment under appeal. See also point 42 of this Opinion.

29 — Paragraph 378 of the judgment under appeal.

30 — See, inter alia, paragraphs 406 and 413 of the judgment under appeal.

31 — The first part of the fourth plea in law deals with the duration of the collective exclusive dealing arrangement (Article 1 of the contested decision), the second part thereof with the duration of the price-fixing scheme (Article 2 of the contested decision) and the third part thereof with the duration of TU's participation in both infringements (Article 3 of the contested decision).

32 — See paragraph 61 of the appeal.

33 — See point 20 of this Opinion.

58. However, this is not the full extent of TU's criticism. It also puts forward two further arguments concerning the legal criteria to be taken into account by the Court of First Instance in assessing the duration of infringements. In this respect, its argument concerns questions of law and is therefore admissible.

59. First, TU contends that the Court of First Instance did not demonstrate what constitutes the 'overall plan' and the 'identical object' as a sole result of which a pattern of conduct could become a single, continuous practice.

60. In fact, in order for various actions to be regarded as a single infringement, it is necessary that they 'form part of an "overall plan", because their identical object distorts competition within the common market'. [34]

61. The Court of First Instance in no way disregarded this criterion. On the contrary, in paragraphs 340 to 343 of the judgment under appeal, it devoted an entire section to the overall assessment of the disputed infringements. It stated inter alia that both the infringements found against TU, that is to say the collective exclusive dealing arrangement and the concerted price-fixing practices, pursue an 'anti-competitive purpose, which consists in maintaining prices at supra-competitive levels'. [35] At the same time, it is implicit from this finding of the Court of First Instance that each of the infringements taken by itself, that is to say the collective exclusive dealing arrangement and the concerted price-fixing practices, had a single objective. This is what the Court of First Instance refers to in paragraph 406 of the judgment under appeal, where it refers to the single nature of the infringements in question.

62. TU's argument concerning the 'overall plan' and the 'identical object' is therefore unfounded.

63. Second, TU complains that the Court of First Instance wrongly approved the evidence adduced by the Commission as to the duration of the infringements, which is based merely on sparse and indirect proof.

64. As I have already stated in relation to the third plea in law, evidence based on indicia and coincidences is permitted in competition proceedings. [36] It need hardly be said that such indicia and coincidences — in particular the continuous attendance by TU staff at

34 — *Cement* judgment (cited in footnote 13), paragraphs 258 and 260.

35 — Paragraph 342 of the judgment under appeal.

36 — See points 40 and 41 of this Opinion.

FEG board meetings, including after 1991 — can shed light not only on the mere existence of anti-competitive conduct or agreements, but also on the duration of continuous anti-competitive conduct and the period of application of an anti-competitive agreement.

65. TU's argument is accordingly unfounded on this point also.

66. Consequently, TU's fourth plea in law is inadmissible in part and unfounded in part.

D — *The first and third parts of the fifth plea in law: considerations relating to the amount of the fines*

67. By its fifth plea in law, TU criticises the Court of First Instance's assessments of the amount of the fines. This plea in law is divided into three parts, but the comments below are limited to the first and third parts. The second part, which concerns the possible effects of the excessively long administrative procedure on the amount of the fine, will be considered separately below in connection with the first plea in law. [37]

1. Scope of review

68. Where, in an appeal, the Court of Justice considers complaints concerning the amount of a fine, in which the Court of First Instance has unlimited jurisdiction (under Article 229 EC, in conjunction with Article 17 of Regulation No 17), the following should be noted as regards the scope of review.

69. According to settled case-law, it is not for the Court of Justice to substitute, on grounds of fairness, its assessment of the amount of the fine for the assessment of the Court of First Instance in appeal proceedings. [38] However, the Court of Justice may review whether the Court of First Instance made a *manifest error* or failed to have regard to the principles of proportionality and equality. [39]

37 — See points 128 to 141 of this Opinion.

38 — *Dansk Rørindustri and Others* v *Commission* (cited in footnote 24), paragraph 245. See also Case C-310/93 P *BPB Industries and British Gypsum* v *Commission* [1995] ECR I-865, paragraph 34; Case C-291/98 P *Sarrió* v *Commission* [2000] ECR I-9991, paragraph 73; and *Baustahlgewebe* v *Commission* (cited in footnote 16), paragraph 129.

39 — *Cement* judgment (cited in footnote 13), paragraph 365.

2. Effects of the duration of the procedure on the amount of the fine (first part of the fifth plea in law)

70. By the first part of the fifth plea in law, which concerns inter alia paragraph 413 of the judgment under appeal, TU argues that insufficient account was taken of the duration of the infringements in the determination of the fine. The Commission and the Court of First Instance thereby infringed Article 15 of Regulation No 17 and the relevant guidelines. [40] In this connection, TU claims that the Court of First Instance made an error in law or, at least, failed to state reasons.

71. A closer reading shows that TU also complains essentially that, in its view, the Court of First Instance made an incorrect *assessment of the duration* of the infringements and of their *continuous nature*. The arguments put forward by TU are thus substantively largely the same as those in its fourth plea in law. As mentioned earlier, [41] TU's argument in this regard contains no reasoned indication of an error in law on the part of the Court of First Instance. Consequently, the Court of First Instance was also able to base its assessment of the *amount of the fines* on its findings as to the duration and continuous nature of the infringements. In those circumstances, no manifest error on the part of the Court of First Instance can be discerned.

72. Moreover, contrary to TU's contention, the Court of First Instance was in no way obliged to assume, in its consideration of the amount of the fine, that TU's participation in the price-fixing scheme was merely incidental. The Court of First Instance expressly made findings on TU's active involvement in those infringements and consequently ruled out any mere 'ancillary role' of TU. [42] Consequently, no manifest error on the part of the Court of First Instance can be discerned in this respect, either.

73. Furthermore, TU has adduced no other evidence which might suggest a manifest error or a violation of the principle of proportionality or the principle of equal treatment.

74. Consequently, the first part of the fifth plea in law is unfounded.

40 — Information from the Commission — Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty (OJ 1998 C 9, p. 3).

41 — See points 53 to 66 of this Opinion.

42 — See paragraph 415 of the judgment under appeal, in conjunction with paragraphs 377 to 379 thereof. See also point 51 of this Opinion.

3. Proportionality between the fine imposed on the FEG and the fine imposed on TU (third part of the fifth plea in law)

75. By the third part of the fifth plea in law, TU complains that the fine imposed on it is disproportionate compared with that imposed on the FEG.

76. Firstly, TU again states, as it did in connection with the first part of the fifth plea in law, that its active participation in the price-fixing scheme was limited to the period up to 2 July 1991 and was, furthermore, incidental.

77. As I have stated above, the Court of First Instance did not err in law in finding that TU's active participation went beyond 1991 and was not limited to a merely ancillary role. [43] Consequently, it could base itself on that assumption in its assessment of the amount of the fine. Accordingly, the Court of First Instance does not seem to have made a manifest error on this point.

78. Secondly, TU specifically criticises paragraphs 431 to 434 of the judgment under appeal, where the Court of First Instance finds that the principle of equal treatment has not been infringed.

79. In so doing, TU fails to put forward any *substantiated* argument to show precisely what constituted the discrimination between itself and the FEG and the extent to which the Court of First Instance misunderstood its arguments at first instance.

80. A mere difference in the percentage imposed on TU as compared with FEG in proportion to their respective turnovers does not, at least prima facie, give rise to an infringement of the principle of equal treatment. [44] As the Court of First Instance correctly noted, [45] the Commission is not required, when imposing fines on several undertakings or associations of undertakings implicated in one and the same infringement, to calculate the amount thereof in exact proportion to their respective turnovers. Instead, a large number of factors are important in this context and excessive importance cannot be attached to turnover as an assessment criterion.

81. In the light of the foregoing, the third part of the fifth plea in law is unfounded.

43 — See points 51 and 72 of this Opinion.

44 — See also *Dansk Rørindustri and Others* v *Commission* (cited in footnote 24), paragraphs 243, 315 and 316.

45 — Paragraph 432 of the judgment under appeal.

V — The first plea in law and second part of the fifth plea in law: excessively long procedure

82. TU's first plea in law and the second part of its fifth plea in law form the largest part of the appeal. They are devoted to the consequences which are to be drawn from what the Court of First Instance held to be the excessive length of parts of the administrative procedure before the Commission. Both of them should therefore be examined together.

83. In essence, TU claims that the Court of First Instance infringed Community law or the ECHR,[46] or at least stated incomprehensible reasons in that it did not regard failure to observe a reasonable time-limit as justification for annulling the Commission's decision or further reducing the fine.

A — *The judgment under appeal*

84. The three parts of the first plea in law relate essentially to paragraphs 73 to 94 of the judgment under appeal.

85. In those paragraphs, the Court of First Instance finds, first, that the Commission is required to give a decision within a reasonable period in administrative proceedings in matters of competition under Regulation No 17 which are likely to lead to the penalties provided for by that regulation. In addition, the Court of First Instance recalls that the exceeding of such a time-limit, if proved, does not necessarily justify annulment of the contested decision. Annulment is possible only where it has been proved that infringement of the principle that proceedings must be concluded within a reasonable period has adversely affected the ability of the undertakings concerned to defend themselves.[47]

86. In the case at issue, the Court of First Instance distinguishes between three stages in the administrative procedure before the Commission and gives a separate assessment of each.

— The Court of First Instance considers the stage of the procedure *prior to notification of the statement of objections* on 3 July 1996 to be excessively long and, in this regard, also expressly acknowledges a period of inaction

46 — European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950.

47 — Paragraphs 73 and 74 of the judgment under appeal.

attributable to the Commission which lasted over three years. [48] However, the excessive duration of that stage of the procedure is not in itself such as to detract from the rights of the defence since, at that time, the statement of objections had not yet been notified to the parties concerned. No formal accusation can be made nor the rights of the defence adversely affected at all until that statement of objections has been notified. [49]

— The Court of First Instance does not consider the stage of the procedure *between the statement of objections and the hearing of the parties*, which lasted 16 months, to be excessive. [50]

— The Court of First Instance does, on the other hand, consider the stage of the procedure *between the hearing of the parties and the contested decision* — 23 months in total — to be excessive. [51] However, after further examination, the Court of First Instance concludes that the applicants' rights of defence were not affected by the duration of that last phase of the procedure. [52]

87. In paragraph 438 of the judgment under appeal, to which inter alia the second part of the fifth plea in law relates, the Court of First Instance goes on to comment on the possibility of a judicial reduction of the fine fixed by the Commission. The Court of First Instance states that the applicants have produced no evidence to show why consideration should be given to granting a further reduction of the amount of the fine, that is to say a reduction beyond the EUR 100 000 deduction already made by the Commission. Consequently, there is no reason to grant the applicants' request in that regard.

B — *Main arguments of the parties*

88. TU considers that, in assessing the duration of the procedure, the Court of First Instance should not have drawn a distinction between the stages of the procedure before and after the notification of the statement of objections. It refers to the case-law of the European Court of Human Rights. [53] According to TU, in the light of that case-

48 — Paragraph 77 of the judgment under appeal.

49 — Paragraphs 78 and 79 of the judgment under appeal.

50 — Paragraph 84 of the judgment under appeal.

51 — Paragraphs 85 and 93 of the judgment under appeal.

52 — Paragraphs 86 to 93 of the judgment under appeal.

53 — Footnote not relevant in English.

law,[54] in the present case, in order to determine whether the duration of the procedure was reasonable, account must be taken of the period beginning when the request for information was sent to the FEG and TU in 1991 and, at any rate, the time when the letter of formal notice of 16 September 1991 was sent to the FEG.

89. TU argues that the Court of First Instance should have annulled the contested decision on the ground of the excessive duration of the procedure alone. In its view, the annulment of the contested decision cannot be made subject to a condition that the rights of the defence were also prejudiced.

90. Furthermore, the Court of First Instance failed to appreciate the difficulties which the length of the preparatory inquiries (first stage of the procedure) caused TU in preparing its defence. Relevant documents could no longer be located and, as time went by, it became increasingly difficult, on account of the changes to management and other personnel, to reconstruct events in the past and place them in their correct chronological order. TU also disputes the contention that the infringements found against it continued after 1991.

91. In any event, given the excessively lengthy procedure, the Court of First Instance should have granted a further reduction of the fine. TU submits that the Court of First Instance failed to appreciate that the minimal reduction of the fine in the contested decision was based on the assumption that responsibility for the excessive length of the procedure was to be shared by the Commission and the undertakings concerned.[55] Given that the Commission itself found that responsibility for the excessive duration of the procedure lay entirely with it, the Court of First Instance should have reduced the fine further.

92. The Commission, by contrast, submits that the Court of First Instance kept the judgment under appeal rooted in settled case-law which it correctly applied to the present case. In particular, the Court of First Instance examined the duration of the procedure both before and after the notification of the statement of objections.

93. According to the Commission, the criteria laid down in the ECHR and the

54 — In its written and oral observations, TU refers inter alia to the judgments of the European Court of Human Rights in *Deweer v. Belgium*, judgment of 5 February 1980, Series A no. 35, p. 24, § 46, in *Eckle v. Germany*, judgment of 15 July 1982, Series A no. 51, p. 33, § 73, and in *Corigliano v. Italy*, judgment of 10 December 1982, Series A no. 57, § 34.

55 — Recital 152 in the preamble to the contested decision.

case-law of the European Court of Human Rights cannot be applied blindly in the context of competition law. In its view, there can be no formal accusation before the notification of the statement of objections. A letter of formal notice, such as that sent by the Commission services in this case, differs fundamentally from a formal notification of a statement of objections and therefore has no bearing on the issue which arises here, namely as of when an excessively long procedure can prejudice the rights of the defence.

94. The Commission states that, according to the case-law, the mere length of the procedure cannot give rise to an irregularity and thus to annulment of the contested decision. Instead, what is required is concrete evidence that the rights of defence of the parties concerned have been adversely affected. The appellant, who bears the burden of proof in this respect, has failed to demonstrate convincingly that there has been such an adverse effect. In the view of the Commission, the Court of First Instance fully considered the effects of the long duration of the procedure on TU's rights of defence, in relation to the length of each of the stages of the procedure.

95. As regards a possible reduction of the fine, the Commission considers that the Court of First Instance set out adequate reasons in the judgment under appeal and concluded, in the exercise of its unlimited jurisdiction, that the fine imposed was proportionate.

96. The arguments put forward by CEF are similar to those of the Commission. CEF adds that principal responsibility for the procedure lies with TU and that it could have been avoided had TU put an end to the infringements of which it stands accused.

C — *Assessment*

97. According to settled case-law, in competition matters the principle that action must be taken within a reasonable period must be observed where an administrative procedure is initiated pursuant to Regulation No 17 which may lead to the penalties provided for therein. [56]

98. The principle that action must be taken within a reasonable period is a general principle of Community law which is based on Article 6(1) of the ECHR, [57] and has since

56 — Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others* v *Commission* (*'PVC II'*) [2002] ECR I-8375, paragraph 179.

57 — See, to that effect, *Baustahlgewebe* v *Commission* (cited in footnote 16), paragraph 21, and *PVC II* (cited in footnote 56), paragraphs 170 and 171. However, the Court has also pointed out that 'just like observance of the other procedural safeguards enshrined in Article 6(1) of the ECHR, compliance with the adversarial principle relates only to judicial proceedings before a "tribunal"' (*Cement* judgment (cited in footnote 13), paragraph 70). It may be inferred therefrom that, in any event, *direct* application of Article 6(1) of the ECHR is not possible in administrative proceedings before the Commission.

also been incorporated into Article 41(1) of the Charter of Fundamental Rights of the European Union [58] (right to good administration). [59]

1. The distinction between the two stages of the procedure (first part of the first plea in law)

99. By the first part of its first plea in law, TU criticises the Court of First Instance for having wrongly distinguished between two stages of the procedure in assessing the duration of the procedure and for having applied the principle of a reasonable time-limit only as from the time of the notification of the statement of objections, that is to say, in the second stage.

100. Although, pursuant to Regulation No 17, cartel proceedings are not of a criminal law nature [60] and are not directed against individuals but undertakings, when the Court applies to those proceedings the principle that action must be taken within a reasonable period it adheres closely to the settled case-law of the European Court of Human Rights on Article 6(1) of the ECHR. [61] According to that case-law, the principle that action must be taken within a reasonable period may be applicable long before a formal accusation is made. It is sufficient that *formal charges have been brought* against a person or that that person has been *substantially affected* by measures taken as a result of suspicions against him. [62]

101. Similarly, in cartel proceedings, the principle that action must be taken within a

58 — Signed in Nice on 7 December 2000 (OJ 2000 C 364, p. 1). The Charter of Fundamental Rights does not of course produce binding legal effects similar to those arising from primary law but, as a legal reference source, it does provide indications as to the fundamental rights guaranteed by Community law. See, in this regard, my Opinions in Case C-540/03 *Parliament* v *Council* [2006] ECR I-5769, point 108, and in Joined Cases C-387/02, C-391/02 and C-403/02 *Berlusconi and Others* [2005] ECR I-3565, footnote 83; see, to the same effect, the Opinion of Advocate General Poiares Maduro in Case C-181/03 P *Nardone* v *Commission* [2005] ECR I-199, point 51; the Opinion of Advocate General Mischo in Joined Cases C-20/00 and C-64/00 *Booker Aquaculture and Hydro Seafood* [2003] ECR I-7411, point 126; the Opinion of Advocate General Tizzano in Case C-173/99 *BECTU* [2001] ECR I-4881, point 28; and the Opinion of Advocate General Léger in Case C-353/99 P *Council* v *Hautala* [2001] ECR I-9565, points 82 and 83; Advocate General Alber is more reserved in his Opinion in Case C-63/01 *Evans* [2003] ECR I-14447, point 80.

59 — The Charter of Fundamental Rights does not apply to the present case for temporal reasons because it was not proclaimed until after the contested decision was adopted. However, for future reference it should be noted in cartel proceedings that the Commission has made a solemn undertaking to comply with the Charter of Fundamental Rights and therefore entered into a voluntary commitment (see statement of the President of the European Commission, Romano Prodi, at the Nice European Council on 7 December 2000); see also recital 37 in the preamble to Regulation No 1/2003.

60 — See, in this regard, Article 15(4) of Regulation No 17.

61 — *PVC II* (cited in footnote 56), paragraph 182.

62 — French: '*[L]a période à prendre en considération ... débute dès qu'une personne se trouve officiellement inculpée ou lorsque les actes effectués par les autorités de poursuite en raison des soupçons qui pèsent contre elle ont des répercussions importantes sur sa situation*'; English: '*[T]he period to be taken into consideration ... begins at the time when formal charges are brought against a person or when that person has otherwise been substantially affected by actions taken by the prosecuting authorities as a result of a suspicion against him*'. See judgment of the European Court of Human Rights of 17 December 2004 in *Pedersen and Baadsgaard v. Denmark* [GC], no. 49017/99, § 44; see also, to that effect, the judgments of the European Court of Human Rights in *Ringeisen v. Austria*, judgment of 16 July 1971, Series A no. 13, § 110, and in *Hozee v. the Netherlands*, judgment of 22 May 1998, *Reports of Judgments and Decisions* 1998-III, § 43, and the case-law cited in footnote 54.

reasonable period may also be applicable long before notification of the statement of objections, which is similar to a formal accusation. In this regard, the question whether, and if so when, *formal charges* can be said to exist *prior to* notification of the statement of objections can be left unanswered. The situation of the undertakings concerned may already be 'substantially affected' at the stage of the preliminary investigation by the Commission, both by its investigations pursuant to Article 14 of Regulation No 17 and by its requests for information pursuant to Article 11 of Regulation No 17. [63]

102. After all, such investigative measures usually create the impression amongst the persons concerned that the Commission suspects them of having infringed Article 81 EC or Article 82 EC. This is particularly true where the Commission, as in this case, indicates that it has received a complaint from a third party and that complaint was such as to prompt initial suspicions serious enough to warrant the launch of an investigation. In such circumstances, a request for information addressed to the undertaking concerned is itself comparable to the initial questioning of a suspect, and an investigation of the undertaking concerned comparable to a search of the suspect's premises.

63 — *PVC II* (cited in footnote 56), paragraph 182.

103. Such investigative measures themselves will usually prompt the persons concerned to make strenuous efforts to prepare their defence and, in particular, to seek legal counsel. If necessary, reserves for the payment of any fines must also be set up and account taken of the possible reactions of business partners and the public. Moreover, from that point onwards, the parties concerned are faced with the uncertainty of not knowing when the proceedings against them will end and what the outcome of those proceedings will be. Therefore, they are under increased pressure. In that situation, the principle that proceedings must be concluded within a reasonable period affords them an increased measure of protection which goes beyond that provided by the limitation of actions. [64]

104. Accordingly, the *relevant period* for determining whether cartel proceedings before the Commission are exceptionally long begins not with notification of the statement of objections but with the first investigative measure by the Commission which substantially affected the situation of the undertakings concerned. [65]

64 — As regards limitation periods in cartel proceedings, see, to date, Regulation (EEC) No 2988/74 of the Council of 26 November 1974 concerning limitation periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport and competition (OJ 1974 L 319, p. 1) and, for future cases, Article 25 of Regulation No 1/2003.

65 — *PVC II* (cited in footnote 56), paragraph 182. A different view is taken by Advocate General Mischo in his Opinion in Case C-250/99 P *Degussa* v *Commission* [2002] ECR I-8375, joined, for the purposes of judgment, with *PVC II*, point 40 et seq., who argued against taking account of the period preceding the notification of the statement of objections.

105. However, for the purposes of *assessing the duration* of the administrative procedure, a distinction must be drawn between two successive stages: a *first stage* which begins with the Commission's exercising the investigative powers conferred upon it and covers the period up to notification of the statement of objections; and a *second stage* which covers the period from notification of the statement of objections to adoption of the final decision. [66]

106. As is clear from the judgment in *PVC II*, [67] the principle that action must be taken within a reasonable period applies at both stages of the procedure. However, each of those two stages has its own internal logic: the stage prior to notification of the statement of objections, which begins with the exercise of investigative powers, must enable the Commission, after investigation, to adopt a position on the course which the procedure is to follow, whilst the stage after must enable the Commission, after the hearing of the parties concerned, to reach a final decision on the alleged infringement. That difference in the objectives pursued in turn affects the assessment of whether the length of the relevant stage of the procedure was reasonable, which always requires careful consideration of all the circumstances specific to each particular case. [68]

107. With regard to the first stage of the procedure, that assessment must take proper account of the fact that, when conducting its preliminary investigations, the Commission requires sufficient time to be able to carry out a useful examination of a suspected infringement of Article 81 EC or Article 82 EC. Otherwise there would be a danger that the Commission's role as the authority responsible for enforcing competition rules laid down in the Treaty would be weakened in the long term. Also, the Commission must be able to give certain cases pending before it priority over others; [69] that applies above all, but not only, at times when the competent Commission services are operating beyond full capacity.

108. As far as the second stage of the procedure is concerned, the assessment must take into account that the Commission's investigations have usually been completed by the time the statement of objections is notified, it remaining only for the Commission to make its decision on the basis of the findings obtained from the hearing of the undertakings concerned. At this stage, the Commission has already taken the procedure so far that it would henceforth be unfair to keep the outcome of that procedure from the undertakings concerned for longer than is absolutely necessary. The criteria which

66 — *PVC II* (cited in footnote 56), paragraphs 181 to 183.

67 — *PVC II* (cited in footnote 56), paragraphs 182 to 184.

68 — As regards the applicable criteria, see *PVC II* (cited in footnote 56), paragraphs 187 and 188, and *Baustahlgewebe* v *Commission* (cited in footnote 16), in particular paragraph 29.

69 — See, to that effect, Case T-24/90 *Automec* v *Commission* [1992] ECR II-2223, paragraph 77, and Case C-119/97 P *Ufex and Others* v *Commission* [1999] ECR I-1341, paragraph 88.

must subsequently be applied when assessing the duration of the procedure are correspondingly stricter.

109. TU's argument that the Court of First Instance wrongly drew a distinction between the two stages of the procedure in its assessment must therefore be dismissed as unfounded. TU's criticism that the Court of First Instance only applied the principle of a reasonable time-limit to the second stage of the procedure, that is to say, after the notification of the statement of objections, likewise cannot be accepted. The Court of First Instance expressly found that the Commission's preliminary investigation was also excessively long due to a period of inaction of over three years. [70]

110. In this case, it is undisputed that the two stages of the administrative procedure before the Commission identified by the Court of First Instance [71] — that prior to notification of the statement of objections, on the one hand, and that between the hearing of the parties and the contested decision, on the other — were both excessively long.

111. Therefore, on closer examination the dispute concerns not so much *whether* the two stages of the procedure should have been distinguished and *how* the duration of the procedure at those two stages should have been assessed, but rather which inferences should have been drawn from the excessive duration of the administrative procedure. It is thus necessary to clarify whether the Court of First Instance was able to rule, without erring in law, that the excessive duration of the administrative procedure both before and after the notification of the statement of objections did not entail annulment of the decision or a further reduction of the fine. Since those questions arise in connection with the second and third parts of the first plea in law and also the second part of the fifth plea in law, they will be considered together with those pleas.

2. The link between the excessive duration of the procedure and annulment (second and third parts of the first plea in law)

112. The second and third parts of the first plea in law are given over to the circumstances in which a Commission decision must be annulled in the event of an excessively long administrative procedure.

(a) Annulment only where the ability of the undertaking concerned to defend itself has been adversely affected (second part of the first plea in law)

113. By the second part of its first plea in law, TU claims an infringement of the law or

70 — Paragraph 77 of the judgment under appeal.

71 — See, in this regard, point 86 of this Opinion.

at least a failure to state reasons, on the ground that the Court of First Instance did not annul the contested decision automatically despite finding that the procedure was excessively long.

114. The starting point for considering this issue should be that any unreasonable delay in the proceedings by the Commission constitutes an infringement of a procedural right of the undertakings concerned which is protected as a fundamental right. Moreover, the assumption of such an infringement is not dependent on proof of some form of damage. [72]

115. However, not every procedural defect necessarily has the same consequences. [73] Indeed, the *annulment* of a Commission decision on the ground of infringement of the procedural rights of the parties concerned is only required at all if, had it not been for that infringement, the proceedings could have led to a different result. [74] [75]

116. In matters of competition law, it is settled case-law that an infringement of a procedural right always affects the outcome of the proceedings if that infringement has impeded the defence of the undertakings concerned. [76]

117. The annulment of a Commission decision on the ground of the excessive duration of proceedings is therefore likewise possible only where the undertakings concerned have been able to show that the excessive duration of the proceedings adversely affected their defence. [77] Although the Court has not yet

72 — See, for example, *PVC II* (cited in footnote 56), paragraphs 191 to 200, and *Baustahlgewebe* v *Commission* (cited in footnote 16), paragraphs 26 to 48, which both make the reasonableness of the length of proceedings the sole subject-matter of the examination. In the case-law of the European Court of Human Rights, see, for example, the judgment in *Corigliano v. Italy* (cited in footnote 54), paragraph 31.

73 — The European Court of Human Rights (in *Schouten and Meldrum v. the Netherlands*, judgment of 9 December 1994, Series A no. 304, § 75) also acknowledges that in principle the appropriate sanction for a breach of the principle of a reasonable time-limit should be found in the relevant national legal order; French: '... *il appartient en principe aux juridictions nationales de juger ce que doit être, en vertu de leur système juridique, la sanction appropriée pour une violation, imputable à l'une des parties, de l'exigence d'un "délai raisonnable"* ...'; English: '... *it is in principle for the national courts to decide what the appropriate sanction should be under their legal system for a breach attributable to one of the parties of the "reasonable time" requirement* ...'.

74 — That other outcome may be, for example, a finding of less serious infringements, a lower fine or a withdrawal of proceedings.

75 — See, from an extensive line of case-law, Case 30/78 *Distillers Company* v *Commission* [1980] ECR 2229, paragraph 26, concerning consultation with the advisory committee; Case C-301/87 *France* v *Commission* [1990] ECR I-307, paragraph 31, concerning infringement of the right to be heard; Joined Cases C-465/02 and C-466/02 *Germany and Denmark* v *Commission* [2005] ECR I-9115, paragraphs 36 to 40, concerning language rules in a regulatory committee; and *PVC II* (cited in footnote 56), paragraphs 315 to 328, concerning the right of access to the file. See also, as regards the choice of the correct legal basis and the legislative procedure, Case C-211/01 *Commission* v *Council* [2003] ECR I-8913, paragraph 52, and my Opinion in Case C-94/03 *Commission* v *Council* [2006] ECR I-1, point 53.

76 — See, in relation to infringements of the right of access to the file, Case C-51/92 P *Hercules Chemicals* v *Commission* [1999] ECR I-4235, paragraphs 77 and 82, and *PVC II* (cited in footnote 56), paragraphs 315 to 317 and 321 to 323.

77 — See, by way of example and to the same effect in relation to infringements of the right of access to the file, *PVC II* (cited in footnote 56), paragraphs 318 and 324, and the *Cement* judgment (cited in footnote 13), paragraphs 73 to 75 and 131.

given a ruling expressly to that effect in *cartel* proceedings,[78] this view can none the less be inferred from its decisions in similar cases, where it has already established such a connection between the principle that action must be taken within a reasonable period and the rights of the defence.[79]

118. *A contrario*, the annulment of a Commission decision is *not required by law*, even if the proceedings are excessively long, where it has not been substantively established that the ability of the undertakings concerned to defend themselves has been adversely affected and there is therefore no indication that the excessive duration of the proceedings could have affected the content of the Commission's decision.[80] However, there is always scope in such cases, if requested, for a reduction in the fine on grounds of fairness[81] or the award of appropriate compensation.[82]

119. For that reason, TU's submission to the effect that the contested decision should have been annulled automatically, on the sole ground that the proceedings were excessively long, thus irrespective of whether or not its ability to defend itself was adversely affected, is wrong. The second part of the first plea in law is therefore unfounded.

(b) Adverse effect on the ability of the undertaking concerned to defend itself in the present case (third part of the first plea in law)

120. However, it remains to be examined whether, in this case, the Court of First Instance was able to assume without erring in law that TU's ability to defend itself had not been adversely affected. This question forms the subject-matter of the third part of

78 — See, however, the Opinion of Advocate General Mischo in Case C-250/99 P *Degussa* v *Commission* (cited in footnote 65), points 76, 80 and 83.

79 — See, concerning a case of ECSC aid, Case C-501/00 *Spain* v *Commission* [2004] ECR I-6717, paragraphs 52, 57 and 58; and, concerning a failure to fulfil obligations, Case C-207/97 *Commission* v *Belgium* [1999] ECR I-275, paragraphs 25 to 27, and Case C-96/89 *Commission* v *Netherlands* [1991] ECR I-2461, paragraphs 15 and 16.

80 — See, to that effect, *Baustahlgewebe* v *Commission* (cited in footnote 16), paragraph 49, where the Court of Justice held that a judgment of the Court of First Instance should not be set aside in spite of the excessive duration of the procedure at first instance where there is no indication that the duration of the procedure had any impact on the outcome of the proceedings. See also the Opinion of General Advocate Mischo in Case C-250/99 P *Degussa* v *Commission* (cited in footnote 65), points 75 to 78 and 84 to 85.

81 — See, to that effect, *Baustahlgewebe* v *Commission* (cited in footnote 16), paragraphs 48 and 141 to 143. See also points 130 to 146 of this Opinion.

82 — Similarly, Advocate General Mischo in his Opinion in Case C-250/99 P *Degussa* v *Commission* (cited in footnote 65), point 79. As regards the possibility of bringing an action for damages, see the judgment of the Court of First Instance in Joined Cases T-305/94 to T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *Limburgse Vinyl Maatschappij and Others* v *Commission* [1999] ECR II-931, paragraph 122, confirmed by the judgment of the Court of Justice in *PVC II* (cited in footnote 56), paragraphs 173 to 178.

TU's first plea in law by which it claims that the Court of First Instance made an error in law or at least failed to state reasons. TU argues essentially that its rights of defence were prejudiced by the excessive duration of the first stage of the administrative procedure, that is in the period from the initial measures of inquiry or the Commission's letter of formal notice to the notification of the statement of objections. TU also explains how, in its view, the Court of First Instance failed to appreciate the specific difficulties which an undertaking faces in preparing its defence.

121. In its judgment under appeal, the Court of First Instance rightly assumes that, in cartel proceedings, the undertakings concerned are able to defend themselves against the Commission's allegations only *after* notification of the statement of objections. It is only at that (second) stage of the procedure, when the Commission has concluded its investigations and the administrative procedure becomes adversarial, that the rights of the defence take effect at all. [83] In particular, it is only then that the undertakings concerned have the opportunity to access the file and likewise only then that they are able to express their views on the Commission's statement of objections. On the other hand, the first stage of the procedure is devoted to the Commission's investigations and accordingly makes no provision for the rights of defence of the undertakings concerned. If in that first stage of the procedure the Commission approaches the undertakings concerned, for example with a request for information that is purely an investigative measure, not an element of the hearing. The grant of access to the file is likewise not provided for at that stage of the procedure, for obvious reasons, as it could seriously jeopardise the success of the investigations and have the effect of delaying the procedure rather than expediting it.

122. Therefore, although the *rights* of defence of the undertakings concerned undoubtedly take effect only *after* notification of the statement of objections, that is to say exclusively in the *second* stage of the procedure, the first stage of the administrative procedure nevertheless affects the *ability* of the undertakings concerned to defend themselves.

123. The longer the period between the first investigative measures and notification of the statement of objections, the more likely it is that any exculpatory evidence against the allegations raised in the statement of objections will henceforth be difficult to obtain. It may be perfectly possible to maintain relevant information in books and files in order to be prepared for any administrative or legal proceedings. [84] As TU has rightly indicated, however, the passage of time —

83 — See, to that effect, inter alia *Hercules Chemicals* v *Commission* (cited in footnote 76), paragraph 75, and *PVC II* (cited in footnote 56), paragraphs 315 and 316.

84 — See, to that effect, paragraph 87 of the judgment under appeal.

whether before or after notification of the statement of objections — may make it more difficult to call defence witnesses, in particular because of the natural changes in managerial and other staff in undertakings. The Court of First Instance does not give this matter sufficient consideration in the judgment under appeal. [85]

124. The excessive duration of the first stage of the procedure may in itself affect the subsequent ability of the undertakings concerned to defend themselves and, ultimately, undermine their rights of defence when these become effective in the second stage of the procedure. The Court of First Instance fails to take this into account when it finds that the excessive duration of the first stage of the procedure is 'not in itself such' as to detract from the rights of defence of the undertakings concerned. [86]

125. The Court of First Instance therefore erred in law when, in paragraphs 86 to 93 of the judgment under appeal, it confined the scope of its examination to 'whether the rights of the defence were affected by the [excessive] duration of that [last] phase of the procedure'. [87] The Court of First Instance should have also examined whether the excessive duration of the first stage of the procedure, prior to notification of the statement of objections, could have adversely affected the subsequent ability of the undertakings concerned to defend themselves and, in particular, whether TU produced conclusive evidence of adverse effects.

126. Also, to adopt such an approach is not by any means to bring forward the point at which the rights of the defence are exercised. The hearing of the undertakings concerned and their right of access to the file are and will continue to be confined to the second stage of the procedure, in other words the period *after* notification of the statement of objections. However, this does not rule out the possibility that any adverse effect on the *ability* of the undertaking concerned to defend itself, and therefore any infringement of its *rights* of defence, may already have been caused by excessively long preliminary investigations or indeed by a lengthy period of inaction on the part of the Commission during the first stage of the procedure.

127. As the judgment under appeal does not contain any findings in this regard, it must be set aside and the case — as final judgment cannot be given — referred back to the Court of First Instance for judgment, in accordance with the first paragraph of Article 61 of the Statute of the Court of Justice.

85 — TU had earlier raised the problem of staff turnover in the proceedings at first instance (Case T-6/00) in paragraphs 213 and 214 of its application and in paragraphs 235 and 237 to 239 of its reply, but the Court of First Instance did not refer to it at all in the judgment under appeal, not even indirectly in paragraphs 86 to 93.

86 — Paragraphs 78 and 79 of the judgment under appeal.

87 — Paragraph 86 of the judgment under appeal. With regard to the scope of review, see also paragraph 93 of the judgment under appeal.

3. Reduction of the fine (first plea in law in fine and the second part of the fifth plea in law)

128. Since, in accordance with the foregoing conclusions, the third part of the first plea in law itself warrants that the judgment under appeal should be set aside in its entirety, hereinafter I will comment on the question of a possible reduction of the fine, as defined in the second part of the fifth plea in law and the first plea in law in fine, only in the alternative.

129. TU complains that the Court of First Instance made an error of law or at least failed to state reasons in its remarks on the amount of the fine. In TU's view, the Court of First Instance should have reduced the fine in view of the excessive duration of the procedure. In particular, the Court of First Instance failed to take into account that the responsibility for the excessive duration of the proceedings is attributable solely to the Commission and is not, as the Commission first assumed, [88] shared between itself and the undertakings concerned.

130. As stated earlier, it is not for the Court of Justice to substitute, on grounds of fairness, its own assessment of the amount of a fine for that of the Court of First Instance, where the Court of First Instance exercised its unlimited jurisdiction to make that decision. [89] However, the Court of Justice may examine whether the Court of First Instance made a *manifest error* or failed to have regard to the principles of proportionality and equality. [90]

131. In practice, it must be assumed, first, that a *manifest error* of that kind has been made if the Court of First Instance fails to take into account the extent of its jurisdiction under Article 229 EC in conjunction with Article 17 of Regulation No 17. Second, a manifest error also exists if, prior to its decision on the amount of the fine, the Court of First Instance does not fully consider all the facts and arguments which are material to its decision on the amount of the fine in the case in question. [91]

132. First of all, with regard to the *extent of the powers of the Court of First Instance* under Article 229 EC, it must be borne in

88 — Recital 152 in the preamble to the contested decision.

89 — See the case-law cited in footnote 38 and *PCV II* (cited in footnote 56), paragraph 614.

90 — *Cement* judgment (cited in footnote 13), paragraph 365.

91 — See, to that effect, *Dansk Rørindustri and Others* v *Commission* (cited in footnote 24), paragraphs 244 and 303, and *Baustahlgewebe* v *Commission* (cited in footnote 16), paragraph 128.

mind that its unlimited jurisdiction to review fines is not subject to the same criteria as the annulment of the contested decision, for instance. In particular, its unlimited jurisdiction to review fines is not merely a review as to the legality of the Commission's decision. In exercising that jurisdiction, it may also consider questions of expediency, appropriateness and fairness. Consideration must be given particularly to procedural defects such as a breach of the principle that action must be taken within a reasonable period, for example, which — as I have already mentioned [92] — constitute an infringement of a fundamental right even if they have not affected the content of the Commission's decision and therefore do not lead to its annulment.

133. In this case, the Court of First Instance rightly acknowledged this and held that it was able to grant a further reduction of the fine imposed solely on the basis of the excessive duration of the administrative procedure for which the Commission was responsible. [93] In this regard, the Court of First Instance has therefore not committed a manifest error.

134. However, the situation is different with regard to the obligation of the Court of First Instance to give full *consideration to all the facts and arguments material to the decision.*

135. In the context of the Court's unlimited jurisdiction to review fines, the facts material to the decision in this case included, in particular, the Commission's responsibility for the excessive duration of *two* stages of the administrative procedure, thus its responsibility not only for exceeding the period normally needed between the hearing of the parties and the contested decision, but also for a period of inaction of over three years *prior* to notification of the statement of objections in the preliminary investigation stage.

136. Although, at the beginning of the judgment under appeal, the Court of First Instance finds that the Commission was responsible for the excessive duration of *both* stages of the administrative procedure, [94] later, when exercising its unlimited jurisdiction to review fines, it considers only the Commission's responsibility for the excessive duration of *one* of the two stages, namely the period between the hearing of the parties and the adoption of the contested decision. This is particularly evident in paragraph 436 of the judgment under appeal, where the Court of First Instance begins to consider the amount of the fine. In that paragraph, reference is made only to paragraph 85 of the judgment under appeal, the passage concerning the Commission's responsibility for the excessive duration of the proceedings *after* notification of the statement of objections. However, no reference is made to paragraph 77 of the judgment under appeal, which sets out the

92 — See points 114 to 118 of this Opinion.

93 — See paragraph 436 of the judgment under appeal.

94 — See paragraphs 77 and 85 of the judgment under appeal.

Commission's responsibility for the excessive duration of the proceedings *prior to* notification of the statement of objections.

137. Since the Court of First Instance therefore failed, in the context of a possible reduction on its part of the fine imposed, to give consideration also to the excessive duration of the proceedings *prior to* notification of the statement of objections, it has committed a manifest error of law in exercising its unlimited jurisdiction under Article 229 EC in conjunction with Article 17 of Regulation No 17.

138. Therefore, even if the judgment under appeal — contrary to the view expressed here [95] — were not set aside in its entirety on the sole basis of the first plea in law, it would in any event have to be set aside on the basis of the plea relating to the Court of First Instance's rejection of TU's request for a reduction of the fine imposed on it. Furthermore, in that event, the state of the proceedings would permit the Court of Justice to give final judgment itself on the matter, pursuant to the first paragraph of Article 61 of the Statute of the Court of Justice. In particular, the Court of Justice would be able to give final judgment itself on the reduction of the fine imposed by the Commission. [96]

139. In this case, the Commission itself applied a reduction of EUR 100 000 when calculating the amount of the fine in the contested decision. However, in so doing, it did not distinguish between the various procedural irregularities mentioned in the decision, so it is not clear how much of that EUR 100 000 relates specifically to the excessive duration of the proceedings. Nor did it distinguish between the two stages of the administrative procedure. It likewise did not assume that it was solely responsible for the excessive duration of the proceedings in both stages of the procedure, [97] as the Court of First Instance has since held. In the light of the foregoing, the infringement of TU's rights of defence does not seem to have been taken sufficiently into account by the reduction which the Commission itself applied when calculating the fine.

140. An additional reduction in the fine would therefore be justified. As a starting point, this might be set at EUR 50 000, the reduction which the Court of Justice itself applied in its judgment in *Baustahlgewebe* v *Commission*. [98] In that case, the fine originally imposed by the Commission was of a similar amount to that imposed on TU in this case.

95 — See, in this regard, my comments on the first plea in law in points 120 to 127 of this Opinion.

96 — As was the case, for example, in the *Cement* judgment (cited in footnote 13), paragraphs 384 and 385.

97 — Recitals 151 to 153 in the preamble to the contested decision.

98 — Cited in footnote 16, in particular paragraph 141.

141. Furthermore, in this case, special significance should be attached to the fact that, according to the findings of the Court of First Instance, the Commission is responsible for a period of inaction of over three years. For that reason, it would seem appropriate to reduce the fine by the aforementioned amount of EUR 25 000 for every full year of that inaction in the stage of the procedure *prior to* notification of the statement of objections, therefore by EUR 75 000 in total. Furthermore, the excessive duration of the stage of the procedure *after* notification of the statement of objections should also be taken into account by a further EUR 25 000. That would put at a total of EUR 100 000 the amount by which the Court of Justice could reduce the fine — which currently stands at EUR 2 150 000.

D — *Interim conclusions on the first plea in law and the second part of the fifth plea in law*

142. In the light of the solution proposed here in relation to the third part of the first plea in law, [99] the judgment under appeal must be set aside in its entirety and the case referred back to the Court of First Instance.

143. However, if the Court of Justice were to come to the conclusion — contrary to the view expressed here — that the third part of the first plea in law is unfounded, it should in any event set aside the judgment under appeal in so far as, in that judgment, TU's request for a reduction in the fine imposed on it is rejected. [100] In that event, the Court of Justice should reduce the fine and also dismiss the remainder of the appeal.

VI — Costs

144. Pursuant to the first paragraph of Article 122 of the Rules of Procedure, the Court of Justice must make a decision as to costs only where the appeal is unfounded or where the appeal is well founded and the Court itself must give final judgment in the case.

145. However, since the solution proposed here in relation to the first plea in law requires that the whole case be referred back to the Court of First Instance, costs should be reserved. [101]

99 — Points 120 to 127 of this Opinion.

100 — See points 128 to 141 of this Opinion relating to the first plea in law in fine and to the second part of the fifth plea in law.

101 — See in that regard, for example, Case C-279/98 P *Cascades* v *Commission* [2000] ECR I-9693, paragraph 82; Joined Cases C-83/01 P, C-93/01 P and C-94/01 P *Chronopost and Others* v *Ufex and Others* [2003] ECR I-6993, paragraph 45; and Case C-111/02 P *Parliament* v *Reynolds* [2004] ECR I-5475, point 3 of the operative part.

VII — Conclusion

146. In the light of the foregoing considerations, I propose that the Court should:

(1) set aside the judgment of the Court of First Instance of the European Communities of 16 December 2003 in Joined Cases T-5/00 and T-6/00 *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied and Technische Unie* v *Commission*;

(2) refer the case back to the Court of First Instance;

(3) reserve costs.